Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
APCC Services, Inc.,	)	
Data Net Systems, LLC,	)	
Davel Communications, Inc.,	)	**File No. EB-003-MD-011**
Jaroth, Inc. d/b/a Pacific Telemanagement	)	
Services, and	)	
Intera Communications Corp.,	)	
	)	
Complainants,	)	
	)	
v.	)	
	)	
Network IP, LLC, and	)	
Network Enhanced Telecom, LLP,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 2005 **Released: February 1, 2005**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we largely grant a formal complaint[1] filed by APCC Services, Inc., Data Net Systems, LLC, Davel Communications, Inc., Jaroth, Inc. d/b/a Pacific Telemanagement Services, and Intera Communications Corp. (collectively, "Complainants") against Network IP, LLC, and Network Enhanced Telecom, LLP (collectively, "NIP") pursuant to section 208 of the Communications Act of 1934, as amended ("Act").[2] Complainants claim that NIP violated sections 201(b), 276, and 416(c) of the Act[3] by failing to pay Complainants the compensation required by section 64.1300 of the Commission's rules[4] for certain payphone calls completed during the period October 7, 1997 through November 23, 2001

[1] Formal Complaint, File No. EB-03-MD-011 (filed June 3, 2003) ("Complaint").

[2] 47 U.S.C. § 208.

[3] 47 U.S.C. §§ 201(b), 276, and 416(c).

[4] 47 C.F.R. § 64.1300. Unless otherwise indicated, all C.F.R. references to Part 64 of the Commission's rules refer to the rules in effect during the Relevant Period.

(the "Relevant Period").[5] For the reasons explained below, we find that NIP's failure to pay compensation to Complainants violates section 64.1300 of the rules and thus sections 201(b) and 276 of the Act. Because we grant Complainants' claims under sections 201(b) and 276 of the Act, and such grant will afford Complainants all the relief to which they would be entitled under section 416(c) of the Act, we dismiss without prejudice Complainants' claims under section 416(c).[6]

II. BACKGROUND

A. The Parties

2. APCC Services, Inc., Data Net Systems, LLC, Davel Communications, Inc., and Intera Communications Corp. are billing and collection agents for payphone service providers ("PSPs").[7] Jaroth, Inc. d/b/a Pacific Telemanagement Services is itself a PSP and also a billing and collection agent for other PSPs.[8] NIP is a telecommunications carrier that owns switches and that offers other companies a package of telecommunications services that enables those companies to provide prepaid calling cards to end-user customers.[9] End-user customers can use those prepaid calling cards to make "coinless" calls from payphones.[10] In this proceeding, Complainants seek compensation from NIP for such "coinless" calls placed from payphones owned by Complainants' PSP principals.

B. The Rules Governing Compensation for Coinless Payphone Calls

3. Section 276 of the Act and the Commission's implementing orders determine PSPs' rights to compensation for calls made from their payphones. Section 276(b)(1)(A) of the Act directs the Commission to "establish a per call compensation plan to ensure that all

[5] Although the Complaint does not specifically allege a violation of section 276 of the Act, the Complaint does repeatedly assert that NIP violated the Commission's orders implementing section 276. *See, e.g.*, Complaint at 4-6, 10, ¶¶ 4, 7, 16. Given that the Complaint expressly links section 276 and the relevant Commission orders, we construe Complainants' allegations that NIP violated the orders implementing 276 to be tantamount to an allegation that NIP violated section 276.

[6] This Order addresses only whether NIP violated the Act, and not whether Complainants are entitled to damages, because Complainants exercised their right under rule 1.722, 47 C.F.R. § 1.722, to bifurcate a damages determination from the liability determination. Complaint at 1-2.

[7] Complaint at 2-3, ¶ 1; Revised Joint Statement, File No. EB-03-MD-011, at 6, ¶ 9 (filed Oct. 22, 2003) ("Revised Joint Statement"). Although most sections of the Revised Joint Statement have numbered paragraphs, some do not. In instances where the Revised Joint Statement has paragraph numbers, we have cited to both the page and paragraph number, and in the remaining instances we have cited only to the page number.

[8] Complaint at 2, ¶ 1; Revised Joint Statement at 6, ¶ 9.

[9] Revised Joint Statement at 5, 6, ¶¶ 2, 8.

[10] *See. e.g.*, Revised Joint Statement at 6, ¶ 8; *Telecommunications Relay Services and the Americans with Disabilities Act of 1990, Coin Sent-Paid TRS Call from Payphones,* Public Notice, 19 FCC Rcd 14104, 14105 (Com. Car. Bur. 2004).

payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone . . . ."[11]

4. Two kinds of calls may be placed from a payphone. The first kind is the "coin call," in which the caller initiates the call by depositing coins into the payphone and then dialing the call recipient's number.[12] With respect to these calls, the caller directly compensates the PSP for use of the payphone, and thus section 276 does not require the Commission to "establish a per call compensation plan." The second kind of call is the "coinless call," in which the caller initiates the call not by depositing coins, but rather by dialing a special access number that triggers a specific service (which may or may not then require the dialing of additional numbers), such as directory assistance, operator service, toll-free (*e.g.*, "800") service, and calling card service (either pre-paid or credit).[13] With respect to these calls, the caller does not directly compensate the PSP for use of the payphone, and thus section 276 does require the Commission to "establish a per call compensation plan."

5. Complicating the Commission's task of establishing a per call compensation plan for coinless payphone calls is the fact that several entities may be involved, in one way or another, in a particular coinless payphone call. The local exchange carrier ("LEC") serving the payphone transports the call to the switching facilities of an interexchange carrier ("IXC").[14] In some instances, this IXC then transports the call to the LEC serving the call recipient.[15] In other instances, however, the IXC transports the call to a "reseller," and the call may then be

[11] 47 U.S.C. § 276(b)(1)(A). *See, e.g.*, *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003) ("*Sprint v. FCC"*); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541 (1996) ("*First Report and Order*") (some subsequent history omitted); Order on Reconsideration, 11 FCC Rcd 21233 ("*Order on Reconsideration*") (some subsequent history omitted); Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (1999) (*Third Report and Order*) (subsequent history omitted).

[12] *See, e.g., Third Report and Order*, 14 FCC Rcd at 2548, ¶ 4 (discussing methods of placing calls at payphones); *Sprint v. FCC*, 315 F.3d at 370 (distinguishing "coin calls" from "coinless calls").

[13] *See, e.g.*, *Third Report and Order*, 14 FCC Rcd at 2549, ¶ 6 (discussing long-distance payphone calls not using the pre-subscribed long-distance carrier); *First Report and Order*, 11 FCC Rcd at 20551-52, ¶ 21 (listing types of payphone calls); *Sprint v. FCC*, 315 F.3d at 370 (describing coinless payphone calls).

[14] Revised Joint Statement at 6, ¶ 8.

[15] *See, e.g., Bell Atlantic-Delaware Inc., v. Frontier Communications Services, Inc.,* 16 FCC Rcd 8112, 8118 at ¶ 13 (2001) ("*Bell Atlantic I*") ("[T]he first facilities-based carrier (*i.e.*, the IXC handling the traffic) compensate[s] PSPs for calls that it transfers directly to the terminating LEC."); *Bell Atlantic-Delaware Inc., v. MCI Telecommunications Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 15918, 15922, at ¶ 9 (Com. Car. Bur. 2002) ("*Bell Atlantic II*") ("A first facilities-based carrier must compensate PSPs for calls that the facilities-based carrier transfers directly to a terminating LEC"); *The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 19975, 19978 at ¶ 6 (2003) (noting that first facilities-based carrier sometimes transmits calls directly to terminating LEC) ("*Tollgate Remand Order*") (subsequent history omitted).

transported to one or more additional resellers before arriving at the LEC serving the call recipient.[16]

6. Some of these resellers possess the switching equipment required to perform the function of transmitting the call; some resellers lack such equipment (*i.e.*, "switchless resellers") however, so they only resell the telecommunications service (*i.e.*, the ability to place a coinless payphone call), and rely on other carriers to perform the actual switching and transmission functions required to complete the call.[17] In other words, only a reseller that possesses switching equipment can physically receive the call and route it onward, either to the LEC serving the call recipient or to the switch of another reseller.[18] In a quite separate function, however, any reseller may resell only the telecommunications service to the public, or to a switchless reseller. Such a switchless reseller may, in turn, resell the service to another switchless reseller, or may sell the service to the public, often in the form of prepaid calling cards.[19]

7. Thus, with respect to each coinless payphone call, there may be *two* daisy-chains of carriers: one transporting the *call* toward the call recipient, and a separate one conveying only the *service* to the end-user consumer who pays for placing the call.[20] And each of these chains can be lengthy.

8. Faced with this complex array, the Commission had a number of options in establishing a plan under section 276 of the Act to ensure that PSPs receive compensation for each coinless payphone call. During the Relevant Period, the Commission chose the following plan: with respect to each coinless payphone call, the party responsible for paying the PSP is the

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[16] *See. e.g., Bell Atlantic I*, 16 FCC Rcd at 8118, ¶ 13; *Bell Atlantic II*, 17 FCC Rcd at 15918, ¶ 5; *Tollgate Remand Order*, 18 FCC Rcd at 19979, ¶ 8. The foregoing description applies only to a long-distance coinless payphone call, which is the only kind of call at issue here. Revised Joint Statement at 6-7, ¶¶ 8, 10.

[17] *See, e.g., Order on Reconsideration*, 11 FCC Rcd at 21277, ¶ 92 (holding responsible resellers that maintain their own switching capability); *Bell Atlantic I*, 16 FCC Rcd at 8114, n.8 ("Resellers can be divided into two categories – 'switchless' and 'switch-based.' Switchless resellers simply rename the underlying IXC service. Switch-based (or 'facilities-based') resellers install their own switch to handle traffic.); *Bell Atlantic II*, 17 FCC Rcd at 15920, ¶ 5 ("Resellers can be divided into two categories – "switchless" and "switch-based." Switchless resellers simply rename the underlying IXC service. Switch-based resellers . . ., on the other hand, install their own switch to handle traffic."); *AT&T Request for Limited Waiver of the Per-call Compensation Obligation, Me*morandum Opinion and Order, 13 FCC Rcd 10893, 10915-16, at ¶ 38, (Com. Car. Bur. 1998) ("*Coding Digit Waiver Order*") (clarifying obligations of switch-based resellers); *Tollgate Remand Order*, 18 FCC Rcd at 19978-79, ¶¶ 7-8 (noting differing responsibilities of switchless- and switch-based resellers).

[18] *Id*.

[19] *See, e.g., First Report and Order*, 11 FCC Rcd at 20586, ¶ 86 ("[T]elecommunications services are often sold in advance, particularly in the debit card context, and resold more than once before a caller ultimately uses the service."); *Order on Reconsideration*, 11 FCC Rcd at 21270-71, ¶ 75 (paraphrasing language quoted above from the *First Report and Order*); *Coding Digit Waiver Order*, 13 FCC Rcd at 10915-16, ¶ 38 (paraphrasing language quoted above from the *First Report and Order*).

[20] *See, e.g. Bell Atlantic I*, 16 FCC Rcd at 8114, ¶ 3 ("[A]n IXC and several resellers may carry a single payphone *call* before the call is transferred to a LEC for completion.") (emphasis added); *First Report and Order*, 11 FCC Rcd at 20586, ¶ 86 ("[T]elecommunications *services* are often sold in advance, particularly in the debit card context, and resold more than once before a caller ultimately uses the service.") (emphasis added).

last identified "*facilities-based*" carrier that physically routes the call to the recipient's LEC.[21] The Commission determined that establishing such a bright-line test for allocation of payment responsibility would be easier to administer, and reasoned that non-facilities-based resellers, who often sell services in advance, would be harder to locate than facilities-based entities.[22]

C. The Coinless Payphone Calls at Issue

9. The coinless payphone calls at issue here were made by end-user customers with prepaid calling cards. When the card-holder placed a coinless call from a payphone owned by one of Complainants' principals, the LEC serving the payphone transported the call to the IXC that NIP had engaged to provide transport services.[23] The IXC transported the call to one of three switches owned by NIP; that NIP switch then routed the call to the terminating LEC (*i.e.*, the LEC serving the call recipient) for completion.[24]

10. The prepaid calling cards used to make the coinless payphone calls at issue here were sold to end-user customers by entities ("Debit Card Providers") to which NIP sold a package of telecommunications services that enabled the Debit Card Providers to offer prepaid calling cards to the public.[25] NIP's package included (i) internet access to traffic and billing records specific to the Debit Card Provider, (ii) call routing by NIP, and (iii) resold transport services of the underlying IXC.[26] The Debit Card Providers played no role in actually transporting the coinless payphone calls at issue here.

11. NIP's relationship with the Debit Card Providers was set forth in detailed contracts.[27] These contracts bear the title "PREPAID CALLING CARD SERVICES AGREEMENT" or

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[21] *First Report and Order*, 11 FCC Rcd at 20586, ¶ 86; *Order on Reconsideration*, 11 FCC Rcd at 21270-71, 21277, ¶¶ 75, 92; *Bell Atlantic I*, 16 FCC Rcd at 8118-19, ¶¶ 13-14; *Bell Atlantic II*, 16 FCC Rcd at 15920-22, ¶ 9 (all promulgating or construing 47 C.F.R. § 64.1300(c)). 47 C.F.R. § 64.1300(c) provides: "In the absence of an agreement as required by subsection (a) herein, the carrier obligated to compensate the payphone service provider shall do so at a per-call rate equal to its local coin rate at the payphone in question." Although the codified rule did not specifically mention the term "facilities-based," it is clear when read in conjunction with the relevant orders that the rule imposed the payment obligations on facilities-based carriers only. Further, this allocation of payment responsibility to facilities-based carriers was expressly stated in the Federal Register summaries and thus is binding. *See, e.g., In Re Applications of Nelson Broadcasting Corporation*, Memorandum Opinion and Order, 6 FCC Rcd 1765 (1991) (requirement in text of a rulemaking order but not in rule is binding if requirement is included in Federal Register summary). *See also* 44 U.S.C. § 1507 (publication in Federal Register generally serves as constructive notice of agency action).

[22] *First Report and Order*, 11 FCC Rcd at 20586, ¶ 86

[23] Revised Joint Statement at 6, ¶ 8.

[24] Revised Joint Statement at 6, ¶ 8.

[25] Revised Joint Statement at 5, ¶¶ 2-3. Some of the Debit Card Providers did not, in fact, sell calling cards directly to end users, but rather resold NIP's services to other entities, which then sold calling cards directly to end users. *Id*. Some provided "PIN-based services." *Id*. These nuances have no bearing on the issues here.

[26] Revised Joint Statement at 5-6, ¶¶ 2, 4, 8.

[27] Revised Joint Statement at 5, ¶ 1; Answer, File No. EB-03-MD-011, Exh. B. (filed Sept. 13, 2003) ("Answer").

"USAGE-BASED UNIVERSAL PIN SERVICES AGREEMENT" ("Service Contract").[28] The Service Contracts describe the services that NIP provided to the Debit Card Providers, such as internet access to account information (including traffic and billing records), custom branding, and technical support.[29] Moreover, many of the Service Contracts specify that the "[Debit Card Provider] shall be responsible for all applicable taxes or assessments . . . (including Universal Service Fund and Payphone Compensation) relating to the Services."[30]

12. The Service Contracts do not suggest any intent for NIP to lease its switching equipment to the Debit Card Providers. For example, the Service Contracts contain no provision describing NIP's switch or switches, or specifying the switch type, manufacturer, or serial number.[31]

13. This dispute began when, during the Relevant Period, end users used prepaid calling cards sold by Debit Card Providers to make coinless calls on payphones owned by principals of Complainants. Upon learning which carriers were involved in transporting those calls, Complainants sought per-call compensation from NIP, arguing that NIP was the last identified facilities-based carrier within the meaning of the Commission's orders.[32] NIP declined to pay, asserting that Complainants should look, instead, to the various Debit Card Providers for compensation because, *inter alia*, the Debit Card Providers, not NIP, were the last identified facilities-based carriers within the meaning of the Commission's rules.[33] Complainants ultimately filed the instant Complaint alleging that NIP's failure to pay compensation violated

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[28] Revised Joint Statement at 8, ¶ 18. *See, e.g.,* the opening words of the Prepaid Calling Card Services Agreement between NIP and Alltel Communications, Inc. (Sept. 22, 2000):

> A. Provider [*i.e.*, NIP] is in the business of providing Services . . .; and
> B. Customer desires to purchase Prepaid Calling Services from Provider for resale to Card Holders.

Such language describing the parties' relationship does not differ materially among the Service Contracts.

[29] *See* Revised Joint Statement at 5-6, ¶ 4; Service Contracts at 3.7 (custom branding) and 4.0 or 4.1 (technical support).

[30] Revised Joint Statement at 7-8, ¶ 16.

[31] Revised Joint Statement at 9, ¶¶ 20-21. *See generally* Uniform Commercial Code § 2A-103 (stating that identification of the goods to be let is the *sine qua non* of a lease).

[32] *APCC Services et al. v. NetworkIP*, Informal Complaint, File No. EB-02-MDIC-0017, at 2-4 (filed Mar. 29, 2002); *APCC Services et al. v. NetworkIP*, Informal Complaint, File No. EB-02-MDIC-0071, at 1-2 (filed Sept. 30, 2002); Complaint at 12-13, ¶¶ 25, 28. *See* Complaint Attach. 6 (e-mail from Greg Haledjian, Manager of Regulatory Affairs, APCC, to Toni Van Burkleo, Chief Financial Officer, NIP (Aug. 18-21, 2000)). *See generally* Complaint at 11, 17, ¶¶ 19-20, 40-42; Reply to Defendant's Answer, File No. EB-03-MD-011, at 3, 4, 7 (filed Sept. 24, 2003) ("Reply"); Complainants' Reply Brief, File No. EB-03-MD-011, at 2-6 (filed Jan. 12, 2004) ("Complainants' Brief").

[33] Complaint, Attach. 2, Letter from Anthony S. Doria, Chief Operating Officer, Network Operator Services, to Vincent R. Sandusky, APCC, (Jan. 14, 2000); Complaint, Attach. 4, Letter from Toni Van Burkleo, Chief Financial Officer, NIP, to Vince Sandusky, President, APCC (Jan. 26, 2000); Complaint, Attach. 6, e-mail from Toni Van Burkleo, NIP, to Greg Haledjian, APCC (Aug. 17-19, 2000). *See* Complaint at 9-11, ¶¶ 15, 17, 19. At least some of the Debit Card Providers have not paid the per-call payphone compensation that Complainants seek. Revised Joint Statement at 4, 8, ¶ 17.

the Commission orders implementing section 276 of the Act, and thus violated sections 276, 201(b), and 416(c) of the Act.

III. DISCUSSION

14. NIP effectively acknowledges, as it must, that whichever entity is the last identified "facilities-based" carrier with respect to the coinless payphone calls at issue here owes Complainants compensation for the use of their payphones to place those calls.[34] Therefore, the task presented is deciding which entity is the last identified "facilities-based" carrier, NIP or a Debit Card Provider. For the following reasons, we conclude that NIP, and not a Debit Card Provider, is the last "facilities-based" carrier, and thus is the entity responsible for paying payphone compensation to Complainants.

A. The Debit Card Providers Are Not "Facilities-Based," Because They Lack a Possessory Interest in Relevant Equipment.

15. The adjective "facilities-based" is a term of art in the telecommunications industry. It is commonly understood – in payphone contexts and non-payphone contexts – to mean a carrier with some form of *possessory* interest in at least some of the equipment (such as a switch) used to complete calls.[35]

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[34] Answer at iv, 2-3, 8-10, ¶¶ 40-41; Answer, Proposed Conclusions of Fact and Law, 19-20, ¶¶ 7-8, 11-13; Answer, Affidavit of Ronald Hutchison, ¶¶ 1, 5; Brief of NIP, File No. EB-03-MD-011, at 3-6, 9-12, nn.9, 18, 24. (filed Dec. 19, 2003) ("NIP's Brief").

[35] Although context-specific variations exist, the term "facilities-based" always denotes having some form of possessory interest in equipment or capacity. *See, e.g.*, 47 U.S.C. § 271(c)(1)(A) (defining "facilities-based competitors" as carriers providing service "either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."); *Federal-State Joint Board on Universal Service*, Order on Reconsideration, FCC 04-237, 2004 WL 2709589 ¶ 9 (rel. Nov. 29, 2004) (holding that a carrier must be "facilities-based" to be eligible for universal service support under section 214(e)(1)(A) of the Act, 47 U.S.C. § 214(e)(1)(A), which itself requires that an eligible carrier use "its own facilities."); 47 C.F.R. § 63.09(a) ("Facilities-based carrier means a carrier that holds an ownership, indefeasible-right-of-user, or leasehold interest in bare capacity . . . ."); *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 491 (2002) ("[T]o engage in pure facilities-based competition [is] to build its own network to replace or supplement the network of the incumbent."); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15508 at ¶ 10 (1996) ("*Local Competition Order*") ("An incumbent LEC's existing infrastructure enables it to serve new customers at a much lower incremental cost than a facilities-based entrant that must install its own switches, trunking and loops to serve its customers.") (subsequent history omitted); *Clarification of Section 43.61 International Traffic Data Reporting Requirements*, Public Notice, 13 FCC Rcd 12809, 12810 (Int. Bur. 1998) (defining "facilities-based" service as a service provided using channels of communication that the carrier owns, or in which the carrier has some other possessory interest, such as an indefeasible right of use (IRU) or a lease); *Reporting Requirements For U.S. Providers Of International Telecommunications Services Amendment of Part 43 of the Commission's Rules*, Notice of Proposed Rulemaking, 19 FCC Rcd 6460, 6488, at ¶ 74 (2004) (proposing revision of "facilities-based" definition that would continue to require "ownership, indefeasible-right-of-user, or leasehold interest"); *Bell Atlantic I*, 16 FCC Rcd at 8114, n.8 ("Switch-based (or 'facilities based') resellers install their own switches to handle traffic."); *Bell Atlantic II,* 17 FCC Rcd 15918, 15920, n.12 ("Switch-based resellers also are known as 'facilities-based' resellers."); *Tollgate Remand Order*, 18 FCC Rcd at 19976, ¶ 1 ("[F]acilities-based long distance carrier is the switch-based reseller (SBR) or interexchange carrier that completes the call on a switch that it owns or leases."); Harry Newton, Newton's Telecom Dictionary, 340 (16th ed. 2000) (defining

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16. Here, the Debit Card Providers plainly fail to qualify as "facilities-based" carriers within the commonly understood meaning of that term of art: the Debit Card Providers do not have any possessory interest in any of the telecommunications equipment used to complete the coinless payphone calls at issue, *i.e.*, they do not own or lease a switch.[36] Consequently, we have little difficulty in concluding that the Debit Card Providers are not "facilities-based" carriers for purposes of the payphone compensation rules, and that NIP is the facilities-based carrier responsible for paying compensation to Complainants during the relevant period. As a result, NIP's failure to pay compensation violates rule 64.1300(c) and thus sections 276 and 201(b) of the Act.[37]

17. NIP contends that, in the payphone compensation context, the Commission has essentially carved out an exception to the Commission's own explanations, and the industry's common understanding, of the meaning of "facilities-based" carrier.[38] In particular, according to NIP, the Commission has held that an entity may be considered a "facilities-based" carrier under the payphone compensation rules, even if the entity has no possessory interest in any telecommunications equipment, as long as the entity somehow manages in some other way to "maintain its own switching capability."[39] To support this contention, NIP relies on one sentence in one Commission order, to wit:

> "In [a prior Order], we concluded that the underlying facilities-based carrier should be required to pay compensation to the PSP in lieu of a non-facilities-based carrier that resells services . . . . *We clarify that a carrier is required to*

(...continued from previous page)
"Facilities Based Carrier" as a "telecommunications carrier which owns most of its own facilities . . . such as switching equipment and transmission lines . . . . Non facilities based long distance carriers are known as switchless resellers.").

[36] NIP's Answer seems to contend that the Service Contracts conveyed to the Debit Card Providers a leasehold interest in NIP's switches. Answer 3, 9-10, 19-20; ¶¶ 40-41, 7-9, 11-13; Answer, Affidavit of Ronald Hutchison at 2, 4, ¶ 4-6, 10 ("Hutchison Affidavit"). However, by failing to mention that contention again in its subsequent Brief, NIP appears to concede, wisely, that the Service Contracts do not convey to the Debit Card Providers any leasehold interest in NIP's switches. In all material respects, the Service Contracts do nothing more than create fee-for-service arrangements. Nothing in the Service Contracts suggests an intention to lease, such as a provision describing NIP's switch or switches, or identifying the switch type, manufacturer, or serial number. *See* Revised Joint Statement at 9, ¶¶ 20-21. The Service Contracts contain no provisions covering insurance, or stating that NIP reserves title to its switching equipment. *See* Revised Joint Statement at 9, ¶¶ 22-23. The words "lessor" and "lessee" never appear in the Service Contracts, and the word "lease" appears only once, in an unrelated context. *See* Complainants' Reply at 8; Revised Joint Statement at 9, ¶ 19. The Contracts' pricing provisions are not based on flat monthly fees, but rather on per-minute-usage. *See* Revised Joint Statement at 9, ¶ 20; Bruce E. Fritch, Equipment Leasing – Leveraged Leasing, 57 (3d ed. 1988) ("Equipment Leasing Treatise") ("Most leases provide for equal monthly or quarterly rental payments over the fixed term of the lease.") (Fritch). Finally, the Service Contracts – which the parties stipulate "are true, accurate, and speak for themselves" – identify themselves as "Services Agreement" in their titles. Revised Joint Statement at 8-9, ¶¶ 18, 24. *See* Complainants' Reply Exh. 4, Fritch Appendix A at 1303-1316, Lease Agreement (reviewing terms typical of a lease agreement).

[37] 47 U.S.C. §§ 201(b), 267; 47 C.F.R. § 64.1300.

[38] NIP's Brief at 3-7, 9-11.

[39] NIP's Brief at 3-7.

> *pay compensation and provide per-call tracking for the calls originated by payphones if the carrier maintains its own switching capability, regardless if the switching equipment is owned or leased by the carrier* . . . . If a carrier does not maintain its own switching capability, then, as set forth in the [prior Order] and consistent with our clarification here, the underlying carrier remains obligated to pay compensation to the PSP in lieu of its customer that does not maintain a switching capability."[40]

In NIP's view, the sentence emphasized above means that a carrier may qualify as "facilities-based" if it "maintain[s] its own switching capability" by some mechanism other than owning or leasing a switch. NIP is mistaken.

18. First, even when read in isolation, the sentence emphasized above can reasonably be interpreted to mean precisely the opposite of NIP's proffered construction: in order to be "facilities-based," a carrier may "maintain its own switching capacity" in two ways – by either owning or leasing switching equipment – but it does not matter which of those two ways the carrier chooses. In other words, rather than rejecting a possessory interest requirement, the sentence simply clarifies the kinds of possessory interests that will suffice.[41]

19. Second, NIP's construction fatally ignores the context in which the Commission made the statement emphasized above. Specifically, NIP's construction fails to account for the fact that, when the Commission made that statement, the pre-existing regulatory context reflected the prevailing industry understanding that a "facilities-based" carrier is one that has some form of *possessory* interest in equipment.[42] Read in that context, NIP's construction of the sentence emphasized above is wholly implausible. Specifically, if the Commission had intended to depart so significantly from precedent and industry usage by eliminating altogether the possessory interest requirement for "facilities-based" carriers, the Commission surely would have done so expressly. Indeed, what the Commission did do expressly, instead, was clarify that, in the payphone compensation context, the possessory interest requirement for "facilities-based" carriers may be satisfied not just by outright ownership of facilities, but by *leasing* of facilities, as well. Subsequent Commission orders confirm the correctness of this interpretation (and the incorrectness of NIP's interpretation) by reiterating that, to be "facilities-based," a carrier must own or lease equipment.[43]

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[40] *Order on Reconsideration*, 11 FCC Rcd at 21277, ¶ 92 (emphasis added) (footnote and quotation marks omitted).

[41] *See Sprint v. FCC*, 315 F.3d at 375 ("[In] the *First Reconsideration Order*, . . . the Commission simply clarified the definition of a phrase that it had used in the initial rule. 11 F.C.C.R. at 21,277 ¶ 92.").

[42] *See* n.35, *supra*.

[43] *Id*. NIP further argues that, if we limit "facilities-based" carriers to carriers with a possessory interest in equipment, then we can apply that holding prospectively only, because such a holding was not sufficiently predicable from existing precedent. NIP's Brief at 1, 12-13; *see generally* Answer at 9, ¶ 40. We disagree. If NIP is referring to the Commission's orders, then the possessory interest requirement was clearly established therein, for the reasons explained above. *See Report and Order*, 11 FCC Rcd at 20586, at ¶ 86; *Order on Reconsideration*, 11 FCC Rcd at 21271-72, 21277, ¶¶ 75, 92; *Bell Atlantic I*, 16 FCC Rcd at 8114, 8118, n.8, ¶ 13. If NIP is referring to the rule itself, which does not specifically mention the term "facilities-based," it is well-established that where, as

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20. Finally, read in the context of the principal purpose of the Commission's payphone compensation rules – to ensure that PSPs receive compensation for every completed coinless payphone call – NIP's contention that "facilities-based" does not require a possessory interest is not persuasive. It may be true, as NIP asserts and as discussed below, that the Service Contracts purport to enable Debit Card Providers to track calls, which the Commission has recognized is an important component of ensuring that PSPs receive payment.[44] However, just because an entity has call-tracking ability does not mean that the entity can be easily traced down the potentially long chain of entities with a financial interest in the completion of the call, or that, if found, the entity will likely have assets sufficient to permit recovery of payphone compensation.[45] By contrast, an entity with a possessory interest in the telecommunications equipment used to complete the calls is more likely to be found and capable of paying its bills. Moreover, the possessory interest requirement creates a bright-line, easily administrable test for determining the identity of the responsible party. NIP's "maintaining switching capability" test, on the other hand, eliminates the key distinction between entities that actually route calls, and entities that merely resell services, and is therefore vague, ambiguous, and ripe for confusion and litigation.[46] That NIP found it desirable to try to disperse the payment responsibility among the numerous Debit Card Providers, whose "own switching capability" consisted of nothing more than access to data via an internet web site, demonstrates the prudence of locating the compensation responsibility squarely on carriers who have a possessory interest in the relevant equipment.

21. Perhaps sensing the weakness of its argument that "facilities based" does not require a possessory interest in switching equipment, NIP argues alternatively that we should take a broad view of what constitutes such a possessory interest.[47] According to NIP, the Commission has, in various circumstances, recognized novel forms of conveying assets, including indefeasible rights of use ("IRUs"),[48] Switch Partitioning,[49] unbundled network

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here, a requirement in the text of an order is not included, the requirement is nevertheless binding if it is included in the Federal Register summary. *See* n.21, *supra*.

[44] Answer at 9; NIP's Brief at 3-7 (citing *Order on Reconsideration*, 11 FCC Rcd at 21277, ¶ 92; *The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act Of 1996*, Second Order On Reconsideration, 16 FCC Rcd 8098, 8101, at ¶ 5 (2001) (subsequent history omitted)).

[45] *See generally First Report and Order*, 11 FCC Rcd at 20586-20592 ¶ 86.

[46] In this regard, the Commission has found debit card providers as a class particularly unsuited to bear the payphone compensation responsibility. *First Report and Order*, 11 FCC Rcd at 20586, ¶ 86 ("[T]elecommunications services are often sold in advance, *particularly in the debit card context*, and resold more than once before a caller ultimately uses the service. In such situations, it would be difficult to identify the party that is liable for the per-call compensation.") (emphasis added); *Coding Digit Waiver Order*, 13 FCC Rcd at 10915-16, ¶ 38 (paraphrasing the language quoted above). *See generally Flying J, Inc., and Ton Services, Inc., Petition for Expedited Declaratory Ruling Regarding a Primary Jurisdiction Referral from the United States District Court for the District of Utah, Northern Division*, Memorandum Opinion and Order, 18 FCC Rcd 10311, 10315 at ¶ 10 (2003) (declining to find that credit card-based platforms constitute switches under current technology and Commission rules).

[47] NIP's Brief at i, 10, 18.

[48] NIP's Brief at 11-12.

[49] NIP's Brief at 15-16.

elements ("UNEs"),[50] and Virtual Collocation.[51] NIP appears to analogize its contractual relationship with the Debit Card Providers to these forms of conveyance. Other than a vague assertion about switch partitioning,[52] however, NIP does not describe any resemblance between its Service Contracts and any such arrangements, and we find none.[53]

B. Call Tracking Ability Does Not Equate to Switching Capability.

22. Even assuming, *arguendo*, that NIP is correct that a company need not own or lease a switch to be considered "facilities-based" under the payphone compensation rules, NIP must still establish that a carrier "maintains its own switching capability" in order for such a carrier to bear payment responsibility. NIP fails here, as well. NIP observes that, in deciding which entity should bear the responsibility of compensating PSPs, the Commission examined the question of which entity had the ability to track payphone calls.[54] In NIP's view, therefore, an entity that can track payphone calls is an entity that "maintains its own switching capability" within the meaning of the Commission's orders.[55] We disagree.

23. Contrary to NIP's suggestion, the Commission never treated the terms "call tracking ability" and "switching capability" as synonymous in the relevant orders.[56] Moreover,

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[50] NIP's Brief at 16-17.

[51] NIP's Brief at 17-18.

[52] NIP contends that its relationship with its Debit Card Providers might be "viewed" as switch partitioning, but does not argue that such partitioning in fact occurred. NIP's Brief at 16. Switch partitioning arose as an alternative to the single-user private branch exchange ("PBX"). *Policies Governing the Provision of Shared Telecommunications Service*, Report and Order, 3 FCC Rcd 6931, 6931 at ¶ 4 (1988). In a "partitioned switch," software and special hardware treat certain lines as dedicated. *Id*. In contrast, an "unpartitioned switch" uses the minimum number of shared lines required to meet overall system needs. *Id*. In the instant proceeding, nothing suggests that NIP's Debit Card Providers' traffic used the same switch consistently, much less traveled via dedicated lines or ports. Thus, NIP's arrangement bears no relation to partitioning.

[53] NIP itself states that UNEs are "leased," NIP's Brief at 16; that virtual collocation is "designated equipment . . . dedicated to the use of a particular interconnector," *id.* at 17; and that an IRU involves "conveying assets," *id*. at 11. No such circumstances exist here.

[54] NIP's Brief at 3-4, 6, 10 (citing *Report and Order*, 11 FCC Rcd at 20586, at ¶ 86; *Order on Reconsideration*, 11 FCC Rcd at 11 FCC Rcd 21277, ¶ 92; *The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act Of 1996*, Second Order On Reconsideration, 16 FCC Rcd 8098, 8101, at ¶ 5 (2001) (quoting ¶ 92 of the *Order on Reconsideration*.).

[55] To support this argument, NIP points out that the Service Contracts purport to give Debit Card Providers the ability to track, in real time, the number of completed calls made through the use of a NIP switch and a Debit Card Provider's prepaid calling card. Answer at 9, 20; NIP's Brief at 3-7, 14-15. For the purposes of this Order only, we accept as true, *arguendo*, NIP's assertion that the Debit Card Providers "can track [calls] and pay payphone compensation to the exact extent as can [NIP]." NIP's Brief at 5. NIP's assertion is not supported in the record, however, and Complainants credibly suggest that, at times during the Relevant Period, the Debit Card Providers' call-tracking ability may not have equaled NIP's. *See* Complainants' Reply at 12, n.23.

[56] *First Report and Order*, 11 FCC Rcd 20586-20592, ¶¶ 88-101; *Order on Reconsideration*, 11 FCC Rcd at 21278-79, ¶¶ 93-96 (sections in both orders titled *Ability of Carriers to Track Calls From Payphones* and not discussing payment obligation). NIP cites to no Commission statement concluding or opining that "call tracking" and "switching capability" refer to the same functions.

as evidenced by definitional rules that the Commission adopted in an analogous context, "switching capability" involves the possession of facilities, not just the ability to perform certain functions.[57] Moreover, regarding functions, "switching capability" includes, at a minimum, the basic switching function of receiving and routing calls.[58] Thus, even assuming the Debit Card Providers had call tracking ability, this ability, standing alone, hardly equates to the full range of facilities and functions that, in combination, constitute "switching capability."

C. The Terms of the Service Contracts Do Not Warrant Shifting the Payment Obligation to the Debit Card Providers Under The Rules.

24. NIP further asserts that the Commission should give effect to the parties' contractual intentions, and should not redraft or reform the provision of the Service Contracts that makes the Debit Card Providers responsible for payment of per-call payphone compensation.[59] NIP explains that it has structured its business in reliance upon its reading of the *Order on Reconsideration*[60] and that it has never billed or collected from the Debit Card Providers any charges with which to pay payphone compensation.[61] For these reasons, NIP argues, we should honor NIP's and the Debit Card Providers' intent,[62] and not hold the Service Contracts to "unreasonable standards of technical legal precision."[63]

25. We disagree. First, as discussed above, NIP's scheme conflicts with the Commission's reasoned decision to place responsibility on facilities-based carriers only. Second, in holding that NIP is liable to Complainants, we do not "redraft" or "reform" NIP's Service Contracts with the Debit Card Providers. Our holding does not concern what recourse NIP may have under the Service Contracts regarding Debit Card Providers that agreed but failed to pay payphone compensation.[64] We hold only that, pursuant to the Commission's orders implementing section 276 of the Act, the duty to compensate PSPs remains with the facilities-based carrier, here NIP.[65]

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[57] *See* 47 C.F.R. § 51.319(c) (All our C.F.R. references to Part 51 of the Commission's rules refer to the rules in effect during the Relevant Period).

[58] *See generally id*.

[59] NIP's Brief at 8-9. Answer 3, 9-10, 19-20; ¶¶ 40-41, 8, 13; Hutchison Affidavit at 2, ¶ 4.

[60] NIP's Brief at 3-4.

[61] NIP's Brief at 5.

[62] Revised Joint Statement at 7-8, ¶ 16; Answer at 3, 9, 19, 21, 22; NIP's Brief at 8-9.

[63] NIP's Brief at 11. In its Answer, NIP describes the Service Contracts as written evidence of the Debit Card Providers' switching capability. Answer at 10, ¶ 41.

[64] *See generally First Report and Order*, 11 FCC Rcd at 20586, ¶ 86 (observing that facilities-based carriers may recover expense of payphone per-call compensation from reseller customers as they deem appropriate, including negotiating future contract provisions requiring reseller to reimburse facilities-based carrier for payphone compensation amounts associated with that particular reseller).

[65] Complainants exercised their right under section 1.722(d) of the rules, 47 C.F.R. § 1.722(d), to bifurcate this proceeding and address only liability first. Complaint at 1-2. In its Answer, NIP raised various affirmative defenses

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26. In sum, under the payphone compensation rules, a carrier is "facilities-based" only if it has a possessory interest in the switching equipment used to transmit the calls at issue. Somehow "maintaining" a switching capability by means other than having a possessory interest in the switch is not enough, even if the "maintaining" involves having call-tracking capabilities. Accordingly, NIP, and not the Debit Card Providers, is the "facilities-based" carrier that has the payphone compensation obligations in dispute here. Consequently, NIP's failure to pay payphone compensation to Complainants violated section 64.1300(c) of the rules and thus sections 276 and 201(b) of the Act.

* * * *

27. With respect to Complainants' claim under section 416(c) of the Act, our ruling under sections 201(b) and 276 of the Act will afford Complainants all of the relief to which they would be entitled were we to rule in their favor on this remaining claim. Accordingly, we need not address this claim, and we hereby dismiss it without prejudice.

IV. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201(b), 208 and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), 208, and 276, sections 1.720-1.736 and 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, 64.1300-64.1320, and the authority delegated pursuant to sections 0.111 and 0.131 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.131, that Complainants' claims under sections 201(b) and 276 of the Act are GRANTED.

29. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 208, and 416 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208, and 416, sections 1.720-1.736 and 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, 64.1300-64.1320, and the authority delegated pursuant to sections 0.111 and 0.131 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.131, that Complainants' claim under section 416 of the Act is DISMISSED WITHOUT PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

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that the parties subsequently stipulated "would be more appropriately decided in the damages phase of this proceeding." Answer at 14-17; Revised Joint Statement at 4. We concur with the parties' stipulation.